P R O C E E D I N G S

October 29, 1997 1:30 p.m.

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(The following proceedings were reported by Deborah Pacetti:)

THE COURT: Are you ready, Mr. Grossman?

MR. GROSSMAN: Yes, Your Honor.

THE COURT: Bring out the jury.

(The following proceedings were held in the presence of the jury.)

THE COURT: Be seated, ladies and gentlemen. Mr. Grossman.

MR. GROSSMAN: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. GROSSMAN: Where were we? I was telling you about things this case is not about and I was about to come to the warning, but there is one other thing that this case is not about, and I think there was one thing that I may have misspoken about when I spoke before. I think one time when I talking about Dr. Townsend I said Dr. Rodgman, yeah, you all seem -- obviously Dr. Rodgman -- as Dr. Townsend told you, Dr. Rodgman no longer works at the company, he's a retired old man, but Dr. Townsend is here and he's the

fellow who testified and than the only one that did.

One other thing this case is not about, it's not about whether Mrs. Karbiwnyk couldn't stop smoking, that may be somebody else's case, because she stopped. The testimony was absolutely clear that Mrs. Karbiwnyk never had any interest in stopping smoking until she did, and it was the very first time that she ever tried.

"You didn't stop and you didn't try to stop; isn't that right?

"I never tried to stop permanently until I did.

"Yes, and that was your choice; isn't that right?

"That's right."

This is a case about choice. Some people may choose to stop smoking and have real difficulty, and that's true whether you refer to that behavior as addiction or dependence or habit. The behavior is the behavior whatever name you give it. Some people may have real difficulty, but they can still choose to try or choose not to.

Mrs. Karbiwnyk for many years chose to continue to smoke because she wanted to for a severity of benefits that she believed she got from it, including keeping her weight down, and

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including that she liked it, and including that she had some tensions in her life and it was a way to ease them, then she decided to not to and she stopped.

There is no evidence in this case, not a single bit of evidence, that she couldn't have stopped at an earlier time if she wanted to, just as she did in 1984, or that she couldn't have decided to stop or to try to stop at an earlier age.

Remember Dr. Balson, and I thought it was extraordinary that he was here as the director of mental health in Louisiana Public Health Community, he put up a PET scan of the brain and showed how different nicotine is from hard drugs like cocaine and my God, there was a man who knows what hard drugs is about, he's the guy who was responsible for the Vietnam veterans who came back with hard drug addition, he's worked with this all his life.

Nicotine doesn't effect the frontal lobe,

it' doesn't effect -- it has no effect on judgment, on decision, on decision-making ability, unlike hard drugs.

If Mrs. Karbiwnyk had wanted to stop smoking or had made the choice to stop smoking, Mrs. Karbiwnyk could have made that choice and she could have acted on that choice. Her evidence in her case shows that she could have succeeded in that choice, because she did. Excuse me. But all of the evidence that was put on in this case regarding nicotine, regarding addiction, addiction theories and the rest is interesting as a matter of debate but has no context in this case.

There was not one expert who took the stand, and certainly Mrs. Karbiwnyk didn't take the stand, to say that she couldn't have stopped earlier, or she couldn't have reached a decision to stop earlier; that's just not part of this case.

Okay. Let's turn to the warning claim. I told you earlier that the plaintiff has to show legal cause on the two claims. I've already shown you, I believe, that there is no cause in fact, no cause in fact because of the cell type

of the cancer and because, as Dr. Roggli said, Whatever it was that started up her cancer wasn't a cigarette. But even apart from that, even if you were to get past that issue, and by the way, if you find that they have't proved -- if you find that they haven't proved by the greater weight of the evidence that Mrs. Karbiwnyk never would have gotten the cancer here if she had never smoked Reynolds' cigarettes, there's no further to go. And under those circumstances, the answer to both of those questions has to be

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no because smoking could not be the legal cause of the illness.

But even if you were to get past that, what the plaintiffs must show is first that there was negligence and that that was the legal cause, or that there was a product defect and that was the legal cause; that is, they have to show first of all that Reynolds had an obligation that it failed on, to warn during a period from 1957 to 1969, and I'll come to that, and that if Reynolds had given the warning she wouldn't have gotten the cancer. That's the but-for test, legal cause.

They have to show that there was a defect in

the design, that there was something wrong with the design, and that but for that defect, in the absence of the defect, she never would have gotten cancer. That's their obligation. That's their proof.

Let me show how they have not met that. Turning first to the question of washing. Ladies and gentlemen, as you know, Mrs. Karbiwnyk smoked a number of brands of cigarettes. From 1954 to 1957 she smoked cigarettes by American Tobacco Company. Now, Reynolds has no obligation to put warnings on American Tobacco Company cigarettes. It doesn't make them, it doesn't make the packages, it has nothing to do with American Tobacco Company.

Mrs. Karbiwnyk started smoking Reynolds cigarettes sometime after October of 1957 and the entire warning period that is in question here is between that time -- sometime after October 1957 and July 1st, 1969, when congress' warning became preemptive. That is when it was adequate as a matter of law and no one could challenge it. Unchallenge believe.

Now, let's look at that period because that's the only period that's involved in the

warning claim against Reynolds. What the plaintiffs have to prove is first of all that Reynolds had an obligation to warn during this period. And second, if the warnings had been on the cigarettes during this period, that Mrs. Karbiwnyk never would have gotten the cancer. They have to meet both parts of that test. I don't think they have; in fact, I submit to you that they haven't whatsoever.

The question here, by the way, is not whether it would be a good idea to have warnings, the question here is not whether even would be reasonable to have warnings, the question here is whether it was negligent not to do so, and whether that absence of warning was the cause of her lung cancer.

Now, let's think about products with risks. You go down any department store aisle, any

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supermarket aisle, any sporting good aisle and there are loads of products with risk. Alcohol, certainly; skateboards, butter, almost everything that we have has risks. What makes cigarettes different more than anything else is that the risks are so well-known and have been for so long.

Let's go back to that awareness pole that you saw. Mr. Wilner discussed this with you this morning. This was the pole in 1954, way back, that asked, "Have you heard or read that cigarette smoking may cause lung cancer?" 90 percent of the American public, 1954, had heard or read that. That was greater than the number that could name the first American president or the number in 1983 who could identify Lee Harvey Oswald.

It was greater than the number in 1972, the year of the Watergate break in, it was greater than the number who had heard of the Watergate break in. 76 percent had heard of the Watergate break in. 90 percent in 1954 had heard that cigarettes cause lung cancer. That's an awareness pole. So is this on the Watergate break in. Were you aware of.

Mr. Wilner said that this is like aliens. How many people are aware of reports that aliens had landed on earth? They compared those two. I suggest to you that it's very different.

First of all, I don't know how many people in a pole would respond that they were aware of alien landings, or reports of alien landings, but

I do know how many were aware of the Watergate break in in the year of the Watergate break in, and it was a lot less than were aware of reports of lung cancer in cigarettes in 1954.

Secondly, there's a big difference between going to the supermarket and seeing in the Globe a headline that Martians had landed and turning on your TV and seeing Eric Severide or Murrow in the '50s on a special report recording on studies that showed that cigarettes smoking causes lung cancer.

There's a big difference between seeing it in the Enquirer that it's believed that aliens landed in Arizona and picking up Life magazine and seeing pictures of Ernst Wynder at Washington University in St. Louis developing lung -- developing cancer on the backs of mice. That's a big difference. And if you're a smoker and you see reports on CBS News or in the newspapers, in the serious newspapers, in magazines of lung cancer, obviously that has more personal effect on you, or if you're someone considering smoking, that has much more personal effect on you than seeing some half-crazed report of an alien landing in a journal that no one believes.

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This is a serious matter. It's a different kind of matter. It's a jarring matter. And, of course, we didn't just show you awareness poles, we showed you belief poles. I'm not doing well with these signs. The ballot will follow us. We had aware -- we not only had awareness poles, we had belief poles. And if you recall, in 1954 the same year that 90 percent reported that they had heard that cigarettes cause lung cancer, 70 percent reported that they believed that cigarettes were dangerous. And by the 1980s, it was 95 percent who believed it. Showing that the trend line had continued up throughout that from a very high level that it began it.

This isn't like other products. This isn't like other products with risks that we don't know of. Remember -- as to doctors. Remember that when Dr. Ford was here he testified that in 1965 97 percent of Florida doctors in their pole, 97 percent were specifically telling their patients not to smoke for health reasons.

Now, ladies and gentlemen, you can believe that smoking caused cancer, you can believe that cigarettes cause cancer and still make a rational decision to smoke. Mrs. Karbiwnyk believed that

cigarettes caused cancer and she decided to smoke. You can receive warnings and choose to ignore them, as Mrs. Karbiwnyk said she did, but there is a big difference between hearing serious reports about smoking risks and seeing silly reports of Martian landings.

Let's turn to the question of whether it was appropriate or necessary for Reynolds to warn during this period. Obviously there was a great deal of public awareness during the time, as there was throughout the century. Remember in 1906 the Florida Health Board said that cigarettes were addictive. Remember that in 1899 cigarettes were outlawed in Florida. They weren't outlawed for selling because people necessarily believed them to be safe, and congress hasn't made them a legal product because it believes them to be safe, but rather because it understands that the public knows the risks of the product and also believes that it's a personal choice whether to smoke or not; as it is to take on many other risks in life.

Now, during the '50s, during this period of time, what did the director of the National Cancer Institute say -- or the surgeon general?

Dr. Heller, the head of the National Cancer Institute and Surgeon General Lee Roy Burney, head of the Public Health, Surgeon General in testimony declined to recommend printing of

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warning labels on cigarettes. We don't have sufficient evidence.

Dr. Burney said, Many of us read too much of the fine print on things we buy, and he didn't think it would be a good -- would do much good. American Law Institute, leading lawyers and judges in the United States said on products like cigarettes and alcohol where the risks were well-known --

MR. WILNER: Your Honor, that's not in evidence --

MR. GROSSMAN: That has been commented on, Your Honor.

THE COURT: I will leave that up to jury's recollection, gentlemen.

MR. GROSSMAN: American Law Institute in 1962 said on cigarettes and alcohol, similar products with well-known risks, there was no need to print the warning. The leading public health authorities, the leading legal authorities were saying at that time, There's no need to print the

warning.

Now, you might say as Mr. Wilner has, it would be good to have a warning; I don't know if it would or not. But when the leading lawyers and judges and law professors and medical professors and the surgeon general and the National Cancer Institute were saying that there is no need for a warning and it might be confusing and night not be appropriate, it wasn't negligent not to put on the warning. How could it be? How could it?

This was treated as a societal issue, and it is. This wasn't a Winston issue, it wasn't a Reynolds issue, cigarettes are sold by many companies. And the risks that Mr. Wilner was talking to you about before were not Winston risks or Phillip Morris risks, they were cigarette risks. This has been a national debate throughout the century, and it has been handled on the national and societal basis. That's exactly the way it has been handled.

Now, furthermore, ladies and gentlemen, there is no warning, I think, that would have been -- that would have satisfied the plaintiff's test. Look at the plaintiff's warning, this

eight-page warning. Have you ever seen anything like this in your life? By the way, if you could blow this up, Steve. Example of the proper cigarette package insert. Remember I showed this to you? This was the original warning that we were given by the plaintiffs before they pulled off the 1954 and at the bottom pulled off it said created by Norwood Wilner and Allan Feingold, the one that they later put in evidence they took those off.

They took off the 1954 for a simple reason,

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I submit to you, because in 1954 when Mrs. Karbiwnyk smoked Reynolds wasn't printing up her cigarette packages because she wasn't buying Reynolds' cigarettes. And if you believe as they assert and as their expert, Dr. Feingold, asserted that Mrs. -- in 1954 Mrs. Karbiwnyk started smoking American Tobacco Company cigarettes and became addicted to them, then there was nothing in this warning that would have made a difference. I'll come to that more in a minute.

But the fact of the matter is no one sees a warning like this, eight pages long. In the end it speaks of things that weren't even invented

until the 1970s. For example, ventilated filters. It says, "It's the official government position that cigarette smoking causes cancer," which wasn't until 1964 in the surgeon general's report. And then this warning was shown to their other expert Elizabeth Whelan, and Dr. Whelan said the Dr. Feingold-Mr. Wilner warning was insufficient too. She wanted a 200-page warning. In fact, she wanted a test, like a driver's test, but that's not the way our society works. That is not the kind of obligation that we have. Certainly wasn't the way things were done in the '50s.

Now, consider this with me. I asked Dr. Feingold what kind of warning would be on butter using his test. What are the diseases associated with butter? Arteriosclerosis, heart attach, aortic disease, peripheral vascular disease, colon cancer, breast cancer, rectal cancer, and lung cancer. Have you ever seen that on a stick of butter?

What makes cigarettes different from other products? Is that the risks -- not just that the risks in some respects are different, but they are so well-known. And to say that the risks

that you should spell out every kind of disease associated obscures the basic point. What people had heard in the '50s, what people heard thereafter was that cigarette smoking can cause death. There is nothing stronger. Whether for butter you say it's breast cancer or lung cancer or peripheral vascular disease, there is nothing stronger.

People heard that it shortens their life expectancy, and they heard specifically lung cancer. That's what the public -- all of the public heard. That's what most of the public believed. And that's why the surgeon general and the National Cancer Institute were saying that warnings were inappropriate at that time.

Now, if there were a warning, would have it saved Mrs. Karbiwnyk assuming that her smoking was the cause of her lung cancer? The answer

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unquestionably on the evidence before you is no.
Let's look back, first of all, at Mrs. Karbiwnyk's own testimony. She received many warnings. Remember, first of all, that before she ever smoked she received a warning from her mother who was a nurse's aide, and she received warnings from school, and those warnings from

school were quite explicit. They were very explicit. Remember that rainbow that was stopped, "Don't let smoking shorten your life?" Remember the slaves, "Done be a slave to nicotine?" That was in her textbook. That was the required West Virginia curriculum.

After that, in 1964 she received a warning of the most serious sort, maybe we can put that up on the board.

"By the way, you've always believed what the surgeon general say, didn't you?

"I believed what he said was true, yes.

"And you looked to him for medical advice, isn't that correct?

"Yes. Medical?

"Well, for public health advice. If the surgeon general said something, you believed him?

"Yes.

"Now, Mrs. Karbiwnyk, although the surgeon general had said that cigarette smoking causes cancer --

"Uh-huh.

" -- that had no effect on your conduct at all; isn't that right?

"in what respect?

"You didn't try to look for a different brand, you didn't try to stop smoking, you didn't try to cut down.

"No, I don't think I did.

"And you chose to continue smoking as you had before; isn't that right?

"Yes, sir."

1964 Mrs. Karbiwnyk heard the surgeon general say that cigarette smoking causes cancer and shortens life and she believed it, but she decided to continue exactly as before. Why would a warning in 1957 would have been any different? She haven't proved it would have been, especially since she was a smoker for three years already.

1966 warnings went on the packages.

"A year after you were married in January 1966 the first warnings came on cigarette packages.

"Yes.

"You remember exactly when they came on?

"Not exactly.

"But they told you what you had already heard?

"Yes.

"You understood the risks involved in

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smoking. As you said yourself, it was there in black and white; isn't that right?

"It was on there, yeah.

"And you made a choice to ignore the warning; isn't that correct?

"Yes, I guess so."

Mrs. Karbiwnyk has to prove that she would have followed the warning, that's part of her proof. She has submitted no proof whatsoever that if a warning were on in 1957 she would have followed it.

Then the new warnings came on around the end of 1969. And on July 1st, 1969, congress declared its warning to be adequate as a matter of law and said that no one could challenge it. What did Mrs. Karbiwnyk do then?

"New warnings came only later, you testified something about that. And when you saw them, that only reinforced what you had heard before; isn't that right?

"Yes.

"And you chose to continue notwithstanding that?

"Yes."

Now, Dr. Roggli and Dr. Feingold both said

that if Mrs. Karbiwnyk had stopped smoking when the warnings went on that were adequate as a matter of law, July 1st, 1969, she would not have gotten her lung cancer. Let put up what Dr. Roggli said.

"If she hadn't smoked cigarettes at all in the 1970, it's your testimony that it either would have delayed her cancer or it would have caused her not to have cancer at you?

"Sure.

"But if she had stopped smoking on July 1st, 1969, we would not be here today? More likely than not, she would not have gotten the cancer when she got it or she would not have gotten it at all?

"That's correct."

That's their expert. He said that the absence of a warning, even if there were a need for a warning, even if there were an obligation for a warning, which there isn't when a product's risks are well-known, even then, it couldn't be the legal cause. He said that if there had been -- if she had stopped smoking when she did get a fully adequate warning as a matter of law by definition, we wouldn't be here day.

MR. WILNER: That's objectionable. That's proximate cause.

THE COURT: Overruled.

MR. GROSSMAN: Now, ladies and gentlemen,

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under the circumstances, no matter how you look at it, the plaintiff has not met her burden on the negligence claim, on the warning claim. The plaintiffs have failed to show that a warning in this short period of time was required. And even if there were a required warning, they failed to show that the absence of the warning was the legal cause of her injury. First of all because shear smoking, as we showed in the beginning, in her case can't be shown to be the cause, but secondly, because if she had stopped smoking when as a matter of law, the warning could not be challenged. Plaintiff's own experts say she wouldn't have gotten the cancer.

Let's turn to their other claim, to the design claim. Now, I want to get out the verdict form again. The second question: Were Winstons and Salem Lights cigarettes manufactured by defendant R. J. Reynolds Tobacco Company unreasonably dangerous and defective and the legal cause of the loss, injury or damage to

plaintiff Joann Karbiwnyk? The question is not whether they were dangerous. The Court will define for you, Judge Weatherby will define for you what unreasonably dangerous is.

Many products have risks, but in order for this product to be unreasonably dangerous it must pass certain tests, and when you hear the instructions, you will know that this refers not to the question of whether cigarettes are unreasonably dangerous but rather whether the design of the specific cigarettes in question was unreasonably dangerous.

This is a design question, as you will hear. Every time this is defined by the judge he will speak of the design of the product, and that's all it is. It's just as to the design.

Ladies and gentlemen, what he will say in his instructions every time this is questioned is that in order to find the product to be unreasonably dangerous and defective and a legal cause, you must first find that it is dangerous because of its design. That's what the instructions will say every time. They don't go to the question of whether cigarettes are unreasonably dangerous, our society has made that

determination, our congress has made that determination. Every year that get surgeon general's report. Since 1964 they have required to surgeon general's report every year and they study the question --

MR. WILNER: Which we object. Congress has never stated that cigarettes are not unreasonably dangerous. That is incorrect.

THE COURT: Sustained.

MR. GROSSMAN: Congress has decided that cigarettes should be a legal product with all of

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the information before them, because they want each of us to choose. Because reasonable people can choose to smoke. Dr. Feingold knowing everything, he said, about the risks of cigarettes decided to smoke for many years, while he was in med school and after. Dr. Townsend, who certainly knows everything about the medical literature on cigarettes, decides to smoke.

Our society allows people to make that decision it. It allows us to make a lot of decisions. And congress, having been provided with all the surgeon generals' reports and all the information available, has decided to allow the sale of cigarettes, so has the state of

Florida, which imposes taxes on cigarettes, which provides the circumstances understand which cigarettes can be sold and cannot be sold.

Now, ladies and gentlemen, your job here is to follow the law, is to apply the law. Remember when we said in the beginning of the case, Judge Weatherby is the judge of the law and you are the judge of the facts? Mr. Wilner has spoken several times about the third branch of government, and courts are the third branch of government, and one of our courts, the Supreme Court, can sometimes declare a law unconstitutional, but that's not your job.

Your job, your obligation, is to apply the law as it is provided to you by the Court, to follow the instructions as provided to you by the Court, to apply the but-for test, to apply those instructions only because of design, not because of the question of whether cigarettes as a product should be sold.

I don't think we as a society want juries of six people, as wonderful as the system is, to make the decision whether a product should be sold, we have a representative system of government for that. The question here is the

design of the cigarettes. And let's turn to that.

First of all, I believe that the plaintiffs have somewhat exaggerated the risks, although, there are certainly risks, have exaggerated the risks of smoking, as with demonstrated by Dr. Wecker. Now, here is the report of the surgeon general listing all of the studies that have been done over the years on the relative risks. These are ratios. Can we blow it up anymore, Steve? It's very hard to see.

Most of these ratios of the percentage of cancer among people who smoke and don't, 5, 4, 13, there's one up as high as 36. Most of them you see are in the single digits. That's a ratio, in other words, it's ten times as common to find lung cancer among smokers as non-smokers, or in some cases 20 times, or in some cases 5 or

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4. Mr. Wilner displayed to to Dr. Wecker when he was here, that's nothing like this ratio. The one study that they keep putting in front of you, which was about 75 times, interim report of one study ended up with a relative risk for about 12 and 20 on the amount of cigarette smoke; 20 for the highest number of smokers.

And Dr. Wecker explained to you at great length how these numbers are determined. In fact, what he told you was that when these studies are done, they just count up the number of people who smoke who get lung cancer and compare them to the number of people who don't smoke and get lung cancer and determine the risk with that rates that way.

And they assume that the only thing that's different between smokers and non-smokers is their smoking, but that's not the case. Remember you saw this board, it's a big board, when Dr. Wecker went to exactly the same data set that's used by the surgeon general in the American Cancer Society, he obtained the data set on the run, he put it on his computer, very extensive computer, and he determined whether there was a statistically significant difference on all the risk factors between smokers and non-smokers, and he found that there was. In fact, that the smokers chose the more risky lifestyle in all but 2 of the categories.

So smokers don't just smoke, they do other things. They tend to eat more fatty foods, they tend to sleep irregular hours, they tend to drink

a lot more, that doesn't mean they all do, but these are statistical studies. If you count up to number of diseases among smokers and just attribute it to smoking, you come up with a skewed number.

Dr. Wecker -- Dr. Wecker's testimony is exactly, purely mathematical, using the same formulas exactly that were used by the American Cancer Society, and that were used by the surgeon general. And as he showed you, if you apply the same formulas to other products and to other lifestyles you come up with skewed numbers.

Remember the number -- Dr. Feingold said that the surgeon general has attributed 390,000 deaths a year to smoking. That's a very big number. And Dr. Whelan said 500,000 deaths a year to smoking. Well, there are 987,000 actual deaths of the causes that they were talking about, and as Dr. Wecker testified if you use exactly the same data set, more than half a million deaths, 504,000 are attributed to lack of exercise; 674,000 are attributable to an unhealthy diet; 732,000 are attributable to a lack of social support and stress. You end up with far more deaths than there are in society.

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So obviously these numbers are exaggerated.

Then you heard Dr. Feingold testify that people who smoke lose 23 years of life on average. Now, before I show you Dr. Wecker's numbers, I think your common sense tells you that that can't be right, because we all know smokers, we all that they don't on average die in their early 50s, everybody knows that; it's just built into the formula. Because if you apply the same formula to other things, such as lack of exercise or eating fatty foods, you end up with more than 20 year of lost life no matter what the risk factor is.

Third of all, Dr. Wecker showed you that when you count the wrong thing, you can come up with skewed numbers that increase with the amount that you use. Here's the risk of cirrhoses of the liver from smoking. We know that smoking doesn't cause cirrhosis. We know that smokers tend to drink more, and this is measuring the drinking rather the smoking, because it doesn't control for it.

So these numbers on cigarettes generally have been exaggerated and have been skewed, but this case is not about cigarettes generally,

this case is about Winstons and it's about Salem Lights.

One more thing as to cigarettes generally. Remember this chart comparing Japan and the United States? Those numbers don't just apply to all cause death, they apply to lung cancer specifically. And no matter what year you look at, there's a whole lot more lung cancer in the United States than Japan. And no matter what year you look at, there's a whole lot more smoking in Japan than the United States, and that was true when they smoke non-filtered cigarettes, and it's true when they smoked filtered cigarettes. There are many other factors that enter into lung cancer.

Consider again the Denmark chart comparing it to Sweden. Here are 2 groups that are ethnically identical, so there's not a genetic factor even involved in that. They have had identical rates of smoking for all intents and purposes. They had almost 3 times the rate of lung cancer in Denmark as Sweden because they drink a lot more in Denmark.

Now, Ladies and gentlemen, in fact, you even heard from Dr. Wecker that Ernst Wynder, whose

name you've heard so much about in this trial, who was the fellow in 1950 who wrote the first American report showing a greater incidence of lung cancer among smokers than non-smokers, and

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who did the mouse skin painting experiments in 1954, that Ernst Wynder himself has written in the past ten years that a high-fat diet is more correlated with lung cancer than smoking when you compare one country with another. And that more than anything else explains Japan. It also explains a number of other countries that have very low lung cancer rates even though they have very high smoking rates.

Now, we were talking the instruction on unreasonably dangerous with regard to design, because of design, and, ladies and gentlemen, you heard only one witness in this case who was qualified to talk about cigarette design or who, in fact, did talk about cigarette design. He sits right there, Dr. Townsend.

Dr. Townsend received his doctorate in chemistry here at Florida State, he has worked in cigarette design for 20 years, he has taught cigarette design, he has worked with the government on cigarette design, both the

government of the United States and the government of Canada, he's devoted his life to the issue, and he heads up a staff of hundreds of people devoted to cigarette design.

And who among you would have thought before coming here that R. J. Reynolds would have 75 Ph.D.s on its staff just working on cigarette design? After all, the legal product, as Dr. Townsend told you, the simple product that is included in the Federal Labeling Act is tobacco rolled in paper.

If you can sell tobacco rolled in paper with 50 milligrams of tar, why go to this effort? Why spend so much money on research and development if you're not concerned about people? We'll be talking more about that in a moment. Because this company has taken great responsibility, and it stands here telling you it takes great responsibility.

Now, I don't want to go through all of Dr. Townsend's testimony, which was at great length, on all of the design efforts that Reynolds has made over the years, but remember just basically they said that in the beginning that in the early 1950s they went to the library and they learned

what the public health community was saying about the risks of smoking and they accepted that as a hypothesis to work on for cigarette design, and that's the scientific method. So then what they did was they went to try to determine what the components of smoke were, and to measure those components of smoke, and read the public literature to follow it to see what they should be taking out, and they tried to learn how those components were formed. They did studies on the cigarette and what it's like when it's puffed,

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what the temperature is, because as the temperature varies the chemical composition of the smoke changes.

They looked to see where the air was coming in, they looked to see how they could get more air in and bring less smoke down the chamber. They worked for selective reduction for many years, and they continued. They worked through selective reduction trying the follow the elusive goal of finding that magic bullet. If the scientific community on the outside said that PAHs, which you've heard of, were the likely culprit, they went after reducing those. Benzo(a)pyrene, that was the first thing they

went after, and they went after it in many ways, if you recall Dr. Townsend's testimony. And then after he went after that the scientific community turned to phenols; again, Reynolds' scientists worked at finding ways to reduce the phenols. That was a dead end because the scientific community then turned to ciliastats, Reynolds worked at that. And then it worked -- then they spoken of nitrosamines, Reynolds worked at that. Then again BAP, and Reynolds has worked at that. But whatever it is, whatever that elusive goal was, Reynolds worked at it, and some things they were able to selectively reduce.

For example, by incorporating new papers, plasticizers in the papers, as you heard, they were able to reduce the phenols and the ciliastats to a certain extent. But what worked best for most of the time was general reduction. And they pioneered so many techniques. They worked on filtration, they worked -- they invented reconstituted tobacco from the stems, which has lower tar and nicotine content. They puffed it up like popcorn.

Remember when we passed around the tobacco? They reduced it circumference, the narrowed the

cigarettes. They put holes -- and they didn't invent this, but they put holes in the filters so air would be drawn in through the filter and the smoke would come down at a slower rate. They had porus paper, which was very important to all cigarettes, even unfiltered ones in reducing the number -- the amount of tar and nicotine that came down. And they put in faster burning paper, which made the cigarette burn faster but made it burn cleaner. They did all of those things, and they did more.

They had a huge staff working on this issue for years, and these people devoted their lives to the issue. These people devoted their lives to trying to make cigarettes that were less hazardous and people would buy. And they worked with the government. They worked with the American government and they worked the Canadian

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government, and they worked with anybody who would work them.

Remember the testimony about the Tobacco Working Group, in the '60s and '70s Ernst Wynder was there, and Dietrich Hoffman, his colleague, the 2 most famous American scientists in the public health community on smoking and health,

they worked with them in evaluating 100 cigarette design, and it was Hoffman -- it was Wynder's view that the best way to do it was through general reduction.

I must say, I find it amazing for the plaintiffs, who have not presented a single expert on cigarette design, to come in and challenge general reduction.

MR. WILNER: Personal comment. Objection.

THE COURT: It was, Mr. Grossman, but go ahead.

MR. GROSSMAN: I find it extraordinary that the plaintiffs have not presented an expert on cigarette design. I think that speaks volumes. Consider this: Cigarettes are sold in every country of the world, they are consumed everywhere, there are companies all over that have scientists who have the ability to work on cigarette design. If anybody could produce a cigarette that people would want to smoke that eliminated or almost eliminated the risks that have been associated with cigarettes, they'd make a fortune. And that's is one of the reasons why Reynolds has worked on this too, but no one ever has.

Dr. Townsend testified to you that the American industry is the leader in the world in cigarette technology, and that every Reynolds cigarette has been the state-of-the-art, and Reynolds has been a leader in state-of-the-art for cigarette technology. Now, there has been no contrary testimony. There's been none whatsoever. There has been no testimony about design, the fact of the matter is that Reynolds, as I said, followed Wynder's work, followed the work of the others, worked with Hoffman at the NCI, and when they worked with Hoffman and when they worked with Wynder, what did the public health experts, the leading public health experts say? Well, first of all they said that a safer cigarette has to be acceptable to consumers, and that's why -- one of the many reasons why Reynolds has a range of products, but the highest tar content in any Reynolds product for the last 20 years is lower than the lowest tar content of the '50s.

Ernst Wynder himself in the Banbury report, the Banbury group, remember, was put together after the government fired its NCI workers who were working on safer cigarettes in the TWG

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project, the Tobacco Working Group. Ernst Wynder said, "As a practical matter, it is important to appreciate that a virtually harmless cigarette smoked by only 1 percent of the population will have a lessor impact on the reduction of tobacco-related diseases than the somewhat more harmful cigarettes smoked by 80 percent of the total population. Research on the less harmful cigarette should therefore be directed toward a cigarette containing the lowest possible amount of harmful elements for all tobacco-related diseases, but one that has sufficient acceptability for the largest segment of smokers."

There are many tobacco companies, there are many tobacco companies in the United States, somebody's going to be selling cigarettes, frankly, thank goodness there's one company that's got so many scientists who have been working on this issue and not just selling the cigarettes that have been available historically that have so much higher tar and nicotine contents. And Dietrich Hoffman coming out of that same Banbury conference said, "The tobacco industry responds very well to the scientific

community. I think the tobacco industry adjusts very well to the demands of the logical reasoning of the scientific community and that we should continue on this path."

And as Dr. Townsend told you, Reynolds has consistently tried to work with the government in designing cigarettes and has used every opportunity. Now, in the past couple of years Dr. Townsend and only one other person from the United States, from American Tobacco Company, were invited to work on just this issue in Canada, and that other person was from Reynolds, too. And they continued to work on it. And they have continued to work on it.

And after I discussed -- I was discussing selective reduction and general reduction, well, as Dr. Townsend testified to you, in the 1980s, after the time Mrs. Karbiwnyk stopped smoking, Reynolds began work on Premier, as he showed you. It was technologically impossible to do it earlier, and there is no conflicting evidence, there's none at all. It was technologically impossible. That was a huge risk. It involved hundreds of millions of dollars. And Eclipse -- when Premier failed, when it was not feasible in

the marketplace, Eclipse cost hundreds of millions of dollars in research and development.

Who among you coming here would have thought that Reynolds spends so much more -- first of

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all, that spends so much money on research and development? Who among you would have expected that Reynolds would have spent half of its net worth on the development of a cigarette that may never be sold all in the efforts to reduce the risk of cigarettes? And who among you would have thought -- I believe that plaintiffs will be putting on some evidence, or will be showing you evidence, certainly they put into the record, evidence of the advertising expense of Reynolds. Who among you would have thought that Reynolds, selling a consumer product, spends more on research and development than on advertisement?

This is a company that has been committed to research and development and trying to make cigarettes with lower risks. And in doing that, they follow a hypothetical. They follow what the scientific community on the outside is saying and they pursue it as doggedly as they can.

Now, ladies and gentlemen, on this design defect claim, on the reasonably dangerous because

of its design there are two tests. They both go to the design, but there are 2 alternate tests that you'll hear of. The first is one of community expectations. The second is one called -- where the risks of the design are balanced against the benefits of the design, and there are various factors that will be in the instruction to you that relate to exactly that.

In considering that issue, you've already heard most of the evidence already, in fact, you have already heard most of my argument already, what are the consumer expectations regarding cigarettes? Well, that is what we have been talking about. Consumer expectations are not that this is a safe product, those have never been consumer expectations regarding cigarettes. Not at all time for the last half century certainly.

And what -- when we saw earlier the awareness and belief poles, they can tell you only one thing, consumer -- consumers believe cigarettes to be a risky product, including the risk of lung cancer, including the risk of death.

Now, I spoke a moment ago about Premier and I had gotten ahead of myself, so I want to back

up. You need not just listen to me or Dr. Townsend, but no other company in the world has done more, not only through Premier, but throughout its history to reduce the risks of cigarettes.

Let me recall, again, Dr. Roggli. He was the first witness so his testimony is farthest in the past. But Dr. Roggli testified on exactly this issue.

"It's your testimony that if the public of smokers had switched over to Premier, than lung

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cancer deaths would have decreased dramatically in that group?
"Yes, sir.
"It would have saved many, many lives?
"Yes, sir.
"And when that failed in the marketplace, Reynolds continued working on a similar property called Eclipse?
"That's correct.
"And it is your testimony that if that product is accepted in the marketplace and is used by current smokers it will save thousands and thousands of lives, that is your testimony?
"Compared to what they're smoking now, yes,

sir, that is right.
"Question: You don't know of any other tobacco company in the world that has done as much as R. J. Reynolds in trying to develop cigarettes that don't contain the chemicals that you and certain other scientists attribute as the cause of lung cancer, you don't know of any, isn't that correct?
"Correct."
I don't think I need to comment on it. But the point of the matter is, as demonstrated not only by Dave Townsend's testimony but by the plaintiff's own experts, that no other company in the world has worked this hard to reduce the risks of cigarettes. That doesn't mean that all the risks are gone, but they have continued work.
You remember earlier that testimony about hitting a wall? It had nothing to do with the document that the plaintiffs were talking about. That had nothing to do with keeping nicotine at 1.3 milligrams, it was never kept there. The arming is far below that today. Instead it was a question of consumer acceptance. Exactly what Ernst Wynder as talking what.
So what did Reynolds do when it hit that

wall of consumer acceptance, and the industry as a whole hit that wall? Reynolds started working on other techniques to reduce the risks. It went again to selective reduction, as Dr. Townsend testified, through a project called EW, which now is intended to try to selectively remove large sets of ingredients in the smoke.
Ladies and gentlemen, as I said, many tobacco companies, many tobacco companies in the world, and if Reynolds weren't working on this and other American companies weren't working on this, you would still have cigarettes in the marketplace like the cigarettes of the '50s.
Now, I was -- I had gotten ahead of myself, I said earlier, and I was talking about the question of consumer expectations and the risk utility test. The question of the risk utility test also involves consumer expectations, but in

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addition to consumer expectations -- risk utility test is the alternate test for determining whether a product is unreasonably dangerous because of its design. In addition to consumer expectations it considers the commercial feasibility of the product.

There is no evidence in this case that any

other designs of cigarettes would be commercially feasible. Remember we were just talking about Premier and Eclipse, over a billion dollars devoted to the research and development of that and people still haven't bought it.

Phillip Morris also, as you have heard testimony about it, has worked on new designs, including one that was called -- it was a Merit product that was tried, and it was marketed under a few names, one was Merit -- one of the Merit products. That involved a method for taking nicotine out of the cigarettes through a system similar to decaffeinization of coffee, to find a way that you could remove nicotine that would be consumer acceptable. They spent hundreds of millions of dollars. No one bought it. It was not commercially feasible. It could not be sold at any price that would make a profit, and that is one of the tests, one of the parts of the risk utility test.

Ladies and gentlemen, when you get right down to it, whether you do it under a pure consumer expectations test or a risk utility test, that involves consumer expectations, the design of these cigarettes is not unreasonably

dangerous. The design of these cigarettes contained risks but they were the risks of cigarettes, and those risks have been well-known.

Remember the testimony -- well, remember the tape Tex Ritter in 1947 singing "Smoke, Smoke, Smoke That Cigarette? Remember the words? "Smoke, Smoke, Smoke that cigarette. Smoke, Smoke until you smoke yourself to death. Tell Saint Peter at the gold gates you hate to make him wait, but you've got to have another cigarette?" Causation and addiction. That's 1947. It was the most popular song in the country that year.

This is part of our culture. This is part of what everybody has understood about cigarettes or has heard about cigarettes throughout the century and it's what most people believed for most of the time in question in this case.

Now, remember when Dr. Balson took the stand? He was our last witness. He works with people who want to stop smoking, works with people who are drug addicts, crack cocaine addicts, heroin addicts, he said that in his entire career, which goes back to the early '60s, he has never had a smoker who didn't understand

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the risks of smoking. In fact, in his entire career, every smoker who he's treated has thought he was going to get lung cancer, which, of course, isn't true. 90 percent of smokers don't get lung cancer, but that's not the point. The point is that these risks are so well-known, they are so absorbed by the community.

Consumer expectations of this product are not of safety, not at all, they are well-known by everybody. Now, ladies and gentlemen, I showed you the test before, legal cause, that there must be a defect in the product, in this case, unreasonably dangerous because of its design, and they offered no alternative design at all, and that that design was the cause of the cancer. They have offered no alternative design. They have not suggested that there is any other design that would have averted this cancer.

Again, let's see what Dr. Townsend -- sorry, Dr. Roggli had to say. He made it absolutely clear the plaintiffs case is not based on the design of the product. He couldn't have made it clearer. It's based instead on the fact that these cigarettes were cigarettes.

"If Mrs. Karbiwnyk had smoked any other

cigarettes available during that time period rather than the Winston, more likely than not, it's your testimony that it would not have averted her lung cancer that she was later diagnosed with?

"Correct.

"From the period of 1977 to 1983 she smoked Salem Lights. Now, it's your testimony, is it not, Doctor, that if she had smoked any other cigarette available on the marketplace during that time, more likely than not it would not have averted her lung cancer she was diagnosed with; isn't that correct?

"Correct.

"So your testimony is it's not based upon the design of these cigarettes but the fact that they are cigarettes, correct?

"Yes."

Dr. Feingold testified to the same thing. There is no other cigarette that was available during that period that would have had a different outlook. They cannot meet the test that the design of the cigarette, the specific design of the Winstons and Salem Lights was the legal cause of the cancer. That but for that

design she never would have gotten the cancer.

So ladies and gentlemen, from the beginning, plaintiffs have failed to meet every one of their burdens. They have the burden of proof. They

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have the burden to prove by the weight of the evidence. They have to meet all of their claims, they have to meet the burden of proof on all their claims, on every issue, but they haven't even gotten to square one.

They can't even show that it was cigarettes that triggered that cancer. In fact, their testimony is, more likely than not, it wasn't the Winston or Salem Lights cigarettes that triggered that cancer.

This has been a case about risks and about awareness, and in that, ladies and gentlemen, you have heard a great deal of testimony and a fair amount of argument. As I'm about to leave you, I want to leave you with Mrs. Karbiwnyk's own words.

Remember the end of her cross examination, I asked her if she had heard before coming to this court that yellow vegetables, as they have been, have been associated with a lower lung cancer risk, that is, if you don't eat yellow

vegetables, you're more likely to get lung cancer; she said no. I asked her if she had heard that you're more likely to get lung cancer if you eat a high fat diet, which may be the biggest risk factor of all, according to Ernst Wynder; she said no.

I asked her if she had ever heard before that alcohol was related to lung cancer, as Dr. Thomas testified, and as even her own experts admitted many studies have shown. She said no. I asked her if she ever heard that Jacksonville was related to lung cancer because it had the highest rate of lung cancer in country and nobody knew why, as Dr. Feingold testified to as well ads Dr. Thomas; she said no.

I said, The one thing that you've known all your life essentially was related to lung cancer is smoking; she said yes. And that's the product that she says she wasn't warned about. And that's why what she knew, what she understood, and the choices that she made are at the very center of this lawsuit. And that's one of the many reasons why the plaintiffs have not met their burden. They haven't shown -- they haven't shown that her smoking the particular cigarettes

in question was the cause of the lung cancer, that it never would have happened without them.

They haven't shown that the lung cancer never would have happened if there had been warnings between '57 and '69. They have never shown that the lung cancer never would have happened with the different design of cigarettes, or that was feasible at the time and was commercially acceptable. Or that lung cancer never would have happened because -- I'm sorry. Or that the cigarettes were unreasonably

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dangerous because the public didn't know. Consumer expectations of the product were that they were safe, they haven't shown any that.

The one thing that you know in this case, I submit to you, the one thing you know is that Mrs. Karbiwnyk, through all or at least most of her smoking history understood that cigarettes might kill her, and she said herself that she decide to smoke.

Ladies and gentlemen, I told you in the beginning, and I'm going to tell you again, this has been an extraordinary time for me. I have enjoyed meeting each of you. I have enjoyed talking to you when we met in voir dire. I've

enjoyed putting on this case. I have been honored to work with the people I have worked with, and I'll remember this as long as I live. Thank you. Thank you very much.

THE COURT: Thank you, Mr. Wilner [sic]. Ladies and gentlemen, why don't you step back in the jury room for just a moment, please.

(Short recess.)

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